Supreme Court, U.S.
FILED

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No. 98 133 JUL 13 1998

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1998

UNNAMED ATTORNEY,

Petitioner,

v.

ATTORNEY GRIEVANCE COMMISSION
OF MARYLAND,

Respondent.

On Petition for a Writ of Certiorari
to the Court of Appeals of Maryland

PETITION FOR A WRIT OF CERTIORARI

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58 pp

QUESTION PRESENTED FOR REVIEW

Can petitioner, a Maryland lawyer, avoid production of his documents sought by a subpoena issued by Bar Counsel for the Attorney Grievance Commission of Maryland (as part of an investigation of a complaint against petitioner alleging professional malpractice or misconduct on his part) by asserting a Fifth Amendment privilege against self-incrimination?

LIST OF PARTIES

The caption of this case identifies all of the parties to the proceeding in the Court of Appeals of Maryland.

Petitioner. a member of the Maryland Bar, is unnamed because the case was titled in that manner in the Court of Appeals, where he was identified as "Unnamed Attorney", and because under pertinent Maryland practice proceedings (including investigative activities) in an attorney disciplinary matter are confidential until a petition for disciplinary action is filed against the lawyer by Bar Counsel in the Court of Appeals.

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Petitioner ("Unnamed Attorney", a member of the Maryland Bar) prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland entered on April 10, 1998 in a cause entitled Unnamed Attorney v. Attorney Grievance Commission of Maryland, No. 78, September Term, 1997, affirming a judgment (order) of the Circuit Court for Baltimore County (Maryland) denying petitioner's motion to quash a subpoena for his records issued by Bar Counsel for the Attorney Grievance Commission of Maryland, respondent. In doing so the Court of Appeals decided that petitioner could not avoid production of his documents by asserting his privilege against self-incrimination.

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland is reported at ____ Md. ____, ____ A.2d ____ (1998). A copy thereof is appended hereto. (Infra, App. 1).

A "Correction" sheet issued by the Court of Appeals of Maryland on April 21. 1998 is not reported. A copy thereof is appended hereto. (Infra, App. 33).

The Circuit Court for Baltimore County filed no written opinion. A copy of that court's (unreported) order of July 14, 1997 denying petitioner's motion to quash Bar Counsel's subpoena is appended hereto. (Infra, App. 35).

JURISDICTION

The judgment of the Court of Appeals of Maryland was entered on April 10, 1998. See that court's slip opinion,

filed April 10, 1998. (App. 1). The opinion was corrected on April 21, 1998. See that court's "Correction" sheet. (App. 33).

See also the letter from the clerk of the Court of Appeals, dated May 20, 1998, advising that petitioner's motion for reconsideration was denied. (App. 34).

The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1257.

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const., Amend. V, provides in part pertinent hereto:

> "No person shall . . . be compelled in a criminal case to be a witness against himself."

STATEMENT OF THE CASE

On March 28, 1997 Bar Counsel, acting for the Attorney Grievance Commission of Maryland (the "Commission"), respondent, issued a subpoena directed to petitioner, a member of the Maryland Bar, informing him that he was "COMPELLED TO . . . PRODUCE THE FOLLOWING DOCUMENTS . . . ALL FILES, FINANCIAL RECORDS, LEDGER CARDS AND BANK STATEMENTS pursuant to your representation of Ronald Price, including any contracts with third parties in connection with your representation of Ronald Price" (Subpoena at 1; capitalization in original) at the Commission's office on April 21, 1997. The subpoena was directed to petitioner in his individual capacity and was served on him on April 2, 1997 by leaving it at his attorney's office.

On April 11, 1997 petitioner filed in the Circuit Court for Baltimore County (Maryland) his motion to quash the subpoena, averring therein, in part, that he was the person whose documents were sought by the subpoena and that the documents and their compelled production may tend to incriminate him, in violation of his privilege against self-incrimination under both the Fifth Amendment to the Constitution of the United States and Article 22 of the Maryland Declaration of Rights. See In the Matter of Petitioner, Circuit Court for Baltimore County, Case No. 03-C-97-003597. On April 14, 1997 the Commission filed its opposition to that motion, contending in part that petitioner had "set forth no crime of any nature to formulate the basis for his assertion of a privilege against self-incrimination." (Opposition to Motion to Quash Subpoena at 1; emphasis in original). On May 5, 1997 petitioner filed a reply setting out, in part, his positions with respect to the propriety and validity of his invocation of his constitutional privilege against self-incrimination.

On July 14, 1997, at the conclusion of an open court proceeding at which arguments of counsel on the motion to quash were heard, the circuit court orally announced its decision denying the motion and thereafter entered its written order of the same date stating that "the Motion to Quash Subpoena is hereby denied except to the extent that any information regarding possible criminal activity obtained in connection with said Subpoena may not be disclosed to any person and/or entity by Bar Counsel without prior Order of this Court." (App. 35).

From that order petitioner on August 12, 1997 filed a timely appeal to the Court of Special Appeals, Maryland's intermediate appellate tribunal. Prior to any briefing or argument there, Bar Counsel on or about September 12, 1997 petitioned the Court of Appeals of Maryland for a writ of certiorari, which that court granted on October 14, 1997, Proceedings there subsequently resulted in the April 10, 1998 judgment, review of which by this Court now is sought.

This case arises out of a complaint against petitioner (and his former law partner) filed with Bar Counsel's office by one Ronald Price, a former client. That complaint consisted of an eight page letter accompanied by ten enclosures designated, respectively, as Appendices A through I, and comprising more than seventy-five pages. Mr. Price was a former high school teacher who, after a jury trial in the Circuit Court for Anne Arundel County (Maryland), was convicted on September 9, 1993 of three counts of sexual child abuse, three counts of unnatural and perverted sexual practices and one count charging a fourth degree sexual offense, all stemming from his abuse of three young female students at Northeast High School who at various times were in his charge and under his supervision in his several capacities as teacher, athletic coach and drama coach at the school. Bar Counsel thereupon initiated an investigation, as part of which the subpoena in issue was served.

Some of Mr. Price's convictions were for felonies. On October 14, 1993 he was sentenced to imprisonment for terms which totaled twenty-six years. All of the

convictions were affirmed by the Court of Special Appeals in an unreported opinion (Price v. State, No. 148, September Term, 1994) filed on December 8, 1994.

Petitioner was one of Mr. Price's lawyers, but was not lead counsel in the circuit court, where he sat second chair, and although his name appeared on the brief filed in Mr. Price's behalf in the Court of Special Appeals, petitioner did not actively participate in the appeal.

Mr. Price's complaint was filed with Bar Counsel's office on September 11, 1995. Among the numerous charges made therein against petitioner (and his co-counsel), Mr. Price stated: "They may well be guilty of criminal negligence due to their avarice, incompetence and conflict of interests." (Mr. Price's September 6 [sic], 1995 letter to Bar Counsel's office [received September 11, 1995] at 7).

A copy of Mr. Price's complaint was furnished petitioner with a letter from Bar Counsel dated September 20, 1995. After having personally dealt with Bar Counsel's office for an interval, petitioner obtained counsel (his current lawyer) who advised Bar Counsel that, if Mr. Price was seeking to attribute any kind of criminal conduct to petitioner, he might, instead of continuing to participate in further voluntary disclosures, assert his privilege against self-incrimination. Thereafter, by letter dated June 20, 1996, petitioner's attorney was informed by Bar Counsel that "[t]his office does not concur with the characterization by the complainant of 'criminal negligence' therefore, at

present, we have no evidence that there has been any activity of a criminal nature engaged in by your client." After further communications between them, Bar Counsel advised petitioner's counsel that Mr. Price had withdrawn any allegations of criminal conduct from his complaint letter.

However, in its opposition filed in the circuit court to petitioner's motion to quash, the Commission averred in part, referring to Mr. Price's complaint, that:

> "Mr. Price complains, among his allegations, that he and his wife signed three contracts with the movant [now petitioner] and have no copies of any of the three. He alleges those documents were signed on April 10, 1993 and involved book and movie deals. He also seeks an accounting of all funds paid by him or his wife for legal representation and any money by [sic] the movant and his partner from any contracts with third parties."

(Opposition to Motion to Quash Subpoena at 2, paragraph 3).

Although the circuit court's denial of petitioner's motion to quash essentially was premised on the proposition that he had not established a substantial and real threat of criminal prosecution, the Court of Appeals took a different tack. It framed the issue before it, more broadly, as being whether petitioner, "'a member of the Maryland Bar, can avoid the production of documents pursuant to a subpoena issued by Bar Counsel by asserting a privilege against self-

incrimination.'" (App. 1-2; slip op. at 1). It assumed that he had "demonstrated sufficiently a basis for raising the privilege" (App. 22; slip op. at 19) and noted that it "need only examine whether appellant [now petitioner] had a Fifth Amendment privilege in the documents sought by the subpoena." (Id.) It concluded that he had no such privilege either in the documents or in their production. (App. 26-27; slip op. at 23-24, 29).

REASONS FOR ALLOWING THE WRIT

In its opinion the Court of Appeals indicated that its disposition of this case rested on "two theories, referred to as the collective entity doctrine and the required records exception, as well as a Supreme Court doctrinal shift in the protection afforded by the Fifth Amendment." (App. 5; slip op. at 4). It also stated, in part, that (contrary to petitioner's contention) this Court's decision in Spevack v. Klein, 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed.2d 574 (1967) "did not address the applicability of the Fifth Amendment to attorney disciplinary proceedings". (App. 24; slip op. at 21).

This case squarely presents an important question regarding the right of a lawyer subjected to an investigation looking towards possible formal disciplinary action against him to have, in preliminary stages potentially leading to initiation of formal disciplinary charges in an appropriate state court, in this instance the Court of Appeals of Maryland, the benefit of a fundamental constitutional protection, the privilege against compelled self-incrimination,

which is afforded everyone by the Fifth Amendment to the Constitution of the United States. By its decision in this case the Court of Appeals has extended to such investigations its apparent position that constitutional safeguards have no place in preliminary stages of attorney disciplinary proceedings, a circumstance which not only necessarily affects every Maryland lawyer, but has national implications as well, potentiality impacting every jurisdiction employing an attorney disciplinary scheme similar to the system existing in Maryland, viz. one in which complaint investigation is followed by peer screening and review, all conducted by agencies functioning similarly to Maryland's Commission and its Bar Counsel, before formal charges are filed.

While a state certainly has broad powers to regulate the practice of law within its borders, in exercising those powers it should not be permitted to ignore or diminish constitutional entitlements of individuals, including, petitioner respectfully suggests, those of lawyers. Cf. Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1, 84 S.Ct. 1113, 12 L.Ed.2d 89 (1964), reh. den. 377 U.S. 960, 84 S.Ct. 1625, 12 L.Ed.2d 505, on remand 207 Va. 182, 149 S.E.2d 265, cert. den. 385 U.S. 102, 87 S.Ct. 754, 17 L.Ed.2d 675; N.A.A.C.P. v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963); Konigsberg v. State Bar of California, 353 U.S. 252, 77 S.Ct. 722, 1 L.Ed.2d 1441 (1957); Schware v. Board of Bar Examiners of state of New Mexico, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957); In Re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 874 (1968). While none of those cases dealt

specifically with the Self-Incrimination Clause of the 5th Amendment, they all appear to militate strongly in support of the proposition that a state is obliged to give appropriate effect to constitutional guarantees (due process of law in most of the cases cited) in implementing its regulation and control of lawyers and the practice of law.

Petitioner respectfully suggests that in the instant case the Court of Appeals of Maryland may well have failed to do that. In reaching its decision it chose to reject petitioner's contention that this Court indicated in Spevack v. Klien, supra, that the constitutional privilege against compelled self-incrimination accrued to the benefit of a lawyer in an attorney disciplinary proceeding. It stated in that regard:

> "Appellant's reliance on Spevack is likewise misplaced. He cites to that case for the proposition that 'the Supreme Court has specifically said that the Fifth Amendment applies to prevent self-incrimination in attorney disciplinary proceedings.' The Supreme Court's plurality opinion in Spevack, however, did not address the applicability of the Fifth Amendment to attorney disciplinary proceedings because the lower court had not questioned the applicability of the Fifth Amendment to attorney disciplinary proceedings. The lower court disbarred the attorney simply because he invoked the privilege against self-incrimination. The Supreme Court held that an attorney could not be disbarred for merely invoking the privi-

> lege. The Court did not address whether any of the exceptions to the Fifth Amendment were applicable. In fact, Justice Fortas, in his concurring opinion, indicated he would have found the Fifth Amendment inapplicable to the records of the attorney on the basis of the required records doctrine. See Spevack, 385 U.S. at 473-74, 87 S.Ct. at 2745, 17 L.Ed.2d at 580."

(App. 23-24; slip op. at 21; underlined words are in italics in original).

This Court in Spevack stated, in part:

> "This is a proceeding to discipline petitioner, a member of the New York Bar, for professional misconduct. Of the various charges made, only one survived, viz., the refusal of petitioner to honor a subpoena duces tecum served on him in that he refused to produce the demanded financial records and refused to testify at the judicial inquiry. Petitioner's sole defense was that the production of the records and his testimony would tend to incriminate him. . . ."

(385 U.S. at 512-13, 87 S.Ct. at 626-27; underlined words are in italics in original).

After discussing Cohen v. Hurley, 366 U.S. 117, 81 S.Ct. 954, 6 L.Ed.2d 156 (1961), which held that the Self-Incrimination Clause of the Fifth Amendment was not applicable to the States through the Fourteenth Amendment, so that New York was allowed to construe its own privilege

against self incrimination so as to make it inapplicable "to judicial inquiries of this nature" (385 U.S. at 513, 87 S.Ct. at 627), and Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964), which held that the Fifth Amendment was applicable to the States by reason of the Fourteenth, this Court, in Spevack, then stated, in part:

> "And so the question emerges whether the principle of Malloy v. Hogan is inapplicable because petitioner is a member of the Bar. We conclude that Cohen v. Hurley should be overruled, that the Self-Incrimination Clause of the Fifth Amendment has been absorbed in the Fourteenth, that it extends its protection to lawyers as well as to other individuals, and that it should not be watered down by imposing the dishonor of disbarment and the deprivation of a livelihood as a price for asserting it. . . ."

(385 U.S. at 514, 87 S.Ct. at 627).

This Court there further stated, in part:

> ". . . We find no room in the privilege against self-incrimination for classification of people so as to deny it to some and extend it to others. Lawyers are not exempt from the words 'No person * * * shall be compelled in any criminal case to be a witness against himself'; and we can imply no exception. . . ."

(385 U.S. at 516, 87 S.Ct. at 628).

Petitioner respectfully submits that the quoted language, in the context of Spevack, readily supports his contention that this Court in that case specifically said that the Fifth Amendment applies to prevent compelled self-incrimination in attorney disciplinary matters. He urges that the Court of Appeals egregiously erred in concluding otherwise and in failing to follow Spevack with respect to all aspects of this case to which it pertains. And even though, as the Court of Appeals points out, the Spevack court may not have specifically ruled with respect to the exceptions to the privilege against self-incrimination upon which the Maryland court now relies, one of which, the required records principle, Spevack discussed, this Court there certainly recognized and accepted the applicability of that privilege in an attorney disciplinary context, when it could very well have, if doing so had been indicated, relied upon one of the same exceptions to which the Court of Appeals now looks to defeat petitioner's assertion of the privilege.

As noted hereinabove (supra at 7) the Court of Appeals, in addition to rejecting Spevack, disposed of this case on the basis of the collective entity doctrine, the required records exception and what it characterized as a doctrinal shift in this Court's approach to application of the Self-Incrimination Clause. With respect to the validity of the Court of Appeals' reliance on the collective entity doctrine, it is noteworthy that it did so despite that. as was uncontested below, the subpoena in issue was directed to petitioner in his individual capacity only and not as a member of the former law firm of which he was a partner at the

time of the representation of Mr. Price, or as custodian of that firm's records. Moreover, the subpoena seeks only his records in connection with his representation of Mr. Price. Furthermore, as the Court of Appeals was fully informed, Bar Counsel apparently found it necessary or advisable to serve another subpoena - and subsequently did so - directed to petitioner as alleged custodian of the records of the former two-man law partnership, thus at least acknowledging that the subpoena which is the subject of this case was directed to petitioner in his individual capacity. (A motion to quash that second subpoena presently still is pending in the Circuit Court for Baltimore County. In re Subpoena Dated July 11, 1997 Issued by Bar Counsel for the Attorney Grievance Commission of Maryland, Case No. 03-C-97-9577).

Despite those telling factors, the Court of Appeals simply found, in part (unwarrantedly, petitioner suggests), that "it is a 'foregone conclusion' that appellant [now petitioner] has possession and control of the client records and financial records of the [former law] partnership." (App. 26; slip op. at 23; words in brackets supplied). (Petitioner is not aware of the source of the words "foregone conclusion", if they are intended to be a quote.) The Court of Appeals then presumed that, despite the plain language of the subject subpoena, the records sought were those of the former law partnership (App. 27, slip op. at 24), which had been defunct for a number of years when Bar Counsel's first subpoena was served. The breadth of the leap implicated in the presumption thus engaged in by the Court of Appeals, from

the circumstance that petitioner had been a member of a no longer extant law firm to the conclusion that the subpoena directed to him individually and seeking his records, without reference to or mention of the former law firm or its records, is per se directed to him as custodian of - and reaches - the firm's records, far exceeds, petitioner submits, reasonable warrant.

The issues as to applicability of the collective entity doctrine, the required records exception and the claimed doctrinal shift in this Court's self-incrimination position, upon which the Court of Appeals' decision appears to be founded, were not presented to or decided by the trial court in the instant case. Thus, with respect to the required records exception, the decision of the Court of Appeals, if allowed to stand, denies petitioner any opportunity to test at the trial court level whether, as the Court of Appeals has held, the Maryland Rules and the Maryland Lawyers' Rules of Professional Conduct do in fact and in law "sufficiently regulate the conduct of attorneys with respect to client matters such that, under the required records doctrine, an attorney cannot claim a Fifth Amendment privilege in the records relating to his or her client" (App. 28; slip op. at 25), as the Court of Appeals, without petitioner's having first been afforded any nisi prius opportunity to contest that issue, now for the first time holds. Similarly, no question as to the effect of the "shift" in this Court's policy or philosophy regarding the privilege against compelled self-incrimination was an issue before the trial court in this case and, not having been decided below, should not have been made the

basis for a decision of first impression in a matter as significant as is the subject matter of the instant case.

The Court of Appeals of Maryland has for some time apparently espoused a "hands off" approach to activities in attorney disciplinary proceedings at stages prior to filing of a petition for disciplinary action in that court. See, for example, Attorney Grievance Commission v. Harris, 310 Md. 197, 528 A.2d 895 (1987). Petitioner respectfully suggests that this Court should not permit a state to clothe its attorney regulatory agency with unbridled authority to subpoena lawyers' records at its sole discretion, unfettered (in view of the decision of the Court of Appeals in this case) even by a constitutional protection as vital and fundamental as the privilege against compulsory self-incrimination. Such unlimited power patently is fraught with danger, no matter how how well intentioned its wielder may be. The awesome ability, conferred upon the Commission by the decision of the Court of Appeals in this case, to require unlimited disclosure by attorneys, whether the documents sought are theirs or those of a former or current law firm, unchecked by any other authority outside the Commission itself, which is seeking the records for its own purposes, is not a matter to be taken lightly. An analogy suggests itself, to Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), where, until this Court by its decision prohibited the shocking practice there in issue, police officers desiring arrest and search warrants (there in a murder case) applied for them, presented their probable cause

to and obtained the warrants from the Attorney General, who was the State's chief enforcement officer, who had personally taken charge of all police activities relating to the murder, who later was the chief prosecutor at trial and who, acting in his capacity as a justice of the peace, signed and issued the warrants himself, without the intervention of, or any participation by, a detached, neutral, judicial officer! Compare the Commission's ability to issue subpoenas, through Bar Counsel, solely on its own determination and in matters with respect to which it clearly has a very plain interest. Such a situation should not be permitted to remain unchecked. The issues and the areas involved patently are, petitioner urges, portentous and pervasive enough to warrant the attention of this Court.

CONCLUSION

For the reasons stated herein, this petition for a writ of certiorari should be granted,

Respectfully submitted,

Benjamin Lipsitz,
Attorney for Petitioner

Baltimore, Maryland

July 9, 1998

APPENDIX

IN THE COURT OF APPEALS OF MARYLAND

No. 78

September Term, 1998

UNNAMED ATTORNEY

v.

ATTORNEY GRIEVANCE COMMISSION
OR MARYLAND

Before Bell, Eldridge, Rodowsky, Chasnow,
Raker. Wilner, Cathell, JJ.

Opinion by Cathell, J.

Filed: April 10, 1998

Unnamed Attorney, appellant, appeals from an order of the Circuit Court for Baltimore County denying his motion to quash a subpoena, which was issued by Bar Counsel on behalf of the Attorney Grievance Commission of Maryland, appellee. The circuit court also ordered production of certain documents relative to appellant's representation of a client. We issued a writ of certiorari prior to briefing and argument in the Court of Special Appeals to address "[whether, the [a]ppellant, a member of the Maryland Bar, can avoid the production of documents pursuant to a subpoena issued by Bar

Counsel by asserting a privilege against self-incrimination." [1]

I. FACTS

The present case stems from appellant's representation of Ronald Price, a former high school teacher charged with various crimes arising out of his abuse of three students at Northeast High School in Anne Arundel County. Mr. Price was convicted of three counts of unnatural and perverted sexual practices and one count of fourth degree sexual offense on 8 September 1993 and sentenced on 14 October 1993 to imprisonment for twenty-six years on the convictions. The Court of Special Appeals affirmed those convictions in an unreported opinion.

Mr. Price filed a complaint with the Attorney Grievance Commission alleging numerous instances of

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[1]This opinion shall address the Fifth Amendment privilege as it relates to the production of records and documents. An attorney's right to invoke the privilege against self-incrimination to refuse to testify during a disciplinary hearing is not at issue. We have recognized an attorney's right to do so in *Attorney Grievance Commission v. Unnamed Attorney*, 298 Md. 36, 43-45, 467 A.2d 517, 520-21 (1983). *See also Black v. State Bar*, 7 Cal. 3d 96, Cal. Rptr. 288, 499 P.2d 968 (1972); *Committee on Professional Ethics & Conduct of the Iowa State Bar Assn. v. Horn*, 379 N.W.2d 6 (Iowa 1985); *Sternberg v. State Bar*, 384 Mich. 588, 185 N.W.2d 395 (1971); *Mississippi State Bar v. Attorney-Respondent in Disciplinary Proceedings*, 367 So. 2d 179 (Miss. 1979).

impropriety by appellant and the law firm in which he was a partner. In relevant part, Mr. Price's complaint charged: "They may well be guilty of criminal negligence due to their avarice, incompetence and conflict of interests."[2] Mr. Price's complaint also alleged that he and his wife had signed three contracts with appellant and sought an accounting with respect to money appellant may have received for Mr. Price's benefit from third parties.

On 28 March 1997, the Attorney Grievance Commission of Maryland served a subpoena on appellant's attorney. The subpoena compelled appellant to produce "ALL FILES, FINANCIAL RECORDS, LEDGER CARDS AND BANK STATEMENTS *pursuant to [his] representation of Ronald Price,* including any contracts with any third parties *in connection with [his] representation of Ronald Price.*" (Emphasis added.) Appellant moved to quash the subpoena alleging that the documents sought "will deprive him of his right against self-incrimination, in violation of both the Self-Incrimination Clause of the Fifth Amendment to the Constitution of the Untied States and Article 22 of the [3] Maryland Declaration of Rights."[3] A hearing on appellant's Motion to Quash

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[2]The Attorney Grievance Commission, through Bar Counsel, later informed appellant that it had no evidence that he engaged in criminal activity and that Mr. Price had withdrawn any such allegations from his complaint. Nevertheless, appellant continued to assert his Fifth Amendment privilege against self-incrimination with respect to the documents.

[3]Appellant attempted to avoid production of the documents in this case only upon self-incrimination

was held on 14 July 1097. The circuit court denied appellant's motion.

Appellant filed a Notice of Appeal on 12 August 1997. The Attorney Grievance Commission, through Bar Counsel, petitioned this Court for a Writ of Certiorari to address whether appellant could prevent the production of the documents enumerated in the subpoena by asserting his privilege against self-incrimination. We granted a writ of certiorari on 16 October 1997 to address this issue prior to briefing and argument in the Court of Special Appeals.

II. FIFTH AMENDMENT PRIVILEGE AS TO DOCUMENTS

The Fifth Amendment to the United States Constitution state that "[n[o person shall . . . be compelled in any criminal case to be a witness against himself." Article 22 of the Maryland Declaration of Rights similarly provides that "no man ought to be compelled to give evidence against himself in a criminal case."[4]

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grounds; no attorney client privilege was raised pursuant to Md. Code (1974, 1995 Repl. Vol.), [sec.] 9-108 of the Courts & Judicial Proceedings Article. For discussion of the invocation of this privilege to prevent the production of attorney records in the attorney disciplinary context, see *In re Kennedy*, 442 A.2d 79, 92 (Del. 1982); *In re Rawson*, 113 N.M. 758, 759-60, 833 P. 2d 235. 236-37 (1992).

[4]Article 22 of the Maryland Declaration of Rights is generally in *pari materia* with the Fifth Amendment of the United States Constitution. *See Bhagwat v. State*, 338 Md. 263, 270-71 n.9, 658 A.2d 244, 247 n.9 (195);

[4] The Fifth Amendment was held to protect an individual from the compelled production of his or her private documents in *Boyd v. United States*, 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886). *Boyd* involved an in rem action against twenty-nine cases of plate glass alleged by the federal government to have been imported in violation of certain revenue statutes. A judge ordered the partners of the partnership that had imported the glass to produce the relevant invoice. The partners produced the invoice, but claimed the document could not be used against them on the ground that such use would result in a violation of the self-incrimination clause of the Fifth Amendment. The Supreme Court agreed and held the invoice constituted a private paper that the government could not compel the partners to produce.

The holding in *Boyd*, however, has been limited severely by two theories, referred to as the collective entity doctrine and the required records exception, s well as a Supreme Court doctrinal shift in the protection afforded by the Fifth Amendment. We shall examine these three limitations below.

A. Collective Entity Doctrine

The origins of the collective entity doctrine can be traced to two cases. The first case, *Hale v. Henkel*, 201 U.S. 43, 26 S. Ct. 370, 50 L. Ed. 652 (1906), held

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Choi v. State, 316 Md. 529, 535-36 n.3, 560 A.2d 1108, 1111 n.3 (1989); *Adkins v. State*, 316 Md. 1, 6-7 n.5, 557 A.2d 203, 205 n.5 (1989); *In re Special Investigation No. 281*, 299 Md. 181, 194 n.1, 473 A.2d 1, 7 n.1 (1984); *Unnamed Attorney*, 298 Md. 1t 43, n.1, 467 A.2d at 520 n.1.

that corporations have no Fifth Amendment privilege. In *Hale*, a corporation was under investigation. A grand jury summoned an officer of the corporation to produce the corporation's books and records, which the officer refused to produce, claiming production of the documents would **[5]** incriminate the corporation. The court, holding that an officer of a corporation cannot assert a Fifth Amendment privilege for a corporation as to that corporation's books and records, reasoned:

> If, whenever an officer or employee of a corporation were summoned before a grand jury as a witness he could refuse to produce the books and documents of such corporation, upon the ground that they would incriminate the corporation itself, it would result in the failure of a large number of cases where the illegal combination was determinable only upon the examination of such papers. Conceding that the witness was an office of the corporation under investigation, and that he was entitled to assert the rights of the corporation with respect to the production of its books and papers, we are of the opinion that there is a clear distinction in this particular between an individual and a corporation, and that the latter has no right to refuse to submit its books and papers for an examination at the suit of the state. . . .
>
> . . . While an individual may awfully refuse to answer incriminating questions, unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges.

Id. at 74-75, 26 S. Ct. at 378-79, 50 L. Ed. at 665-66.

In the second case, *Wilson v. United States*, 221 U.S. 361. 31 S. Ct. 538, 55 L. Ed. 771 (1911), the Supreme Court limited an individual's ability to assert his Fifth Amendment privilege as to the books and records of a corporation, thus giving birth to what has become known as the collective entity doctrine. In *Wilson*, a grand jury issued a subpoena to United Wireless Telegraph Company, compelling it to produce copies of letters and telegrams made by the president of the company, Wilson. The subpoena was served on Wilson, as president of the company, and two other persons. Refusing to produce the records before the grand jury, Wilson asserted that the requested documents would tend to incriminate him and **[6]** therefore he was not required to produce them. The lower court disagreed, and he was found in contempt. Citing to *Hale*, the Court held the custodian of corporate records did not have a Fifth Amendment privilege as to the contents of the records, even though the records tended to incriminate the individual. *See also Dreier v. United States*, 221 U.S. 394, 31 S. Ct. 550, 55 L. Ed. 784 (1911) (holding corporate officer subpoenaed to produce records of a corporation could not assert his Fifth Amendment privilege against self-incrimination with respect to the corporate records).

In *United States v. White*, 322 U.S. 694, 64 S. Ct. 1248, 88 L. Ed. 1542 (1944), the Court examined whether an officer of an unincorporated labor union could assert a Fifth Amendment privilege in the contents of the union's records in his possession. The Court held he could not. Explaining the rationale behind the collective entity doctrine, the Court stated:

> The constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals. . . .

> Since the privilege is a purely personal one, it cannot be utilized by or on behalf of any organization, such as a corporation. Moreover, the papers and effects which the privilege protects must be the private property of the person claiming the privilege, or at least in his possession in a purely personal capacity. But individuals, when acting as representatives of a collective group, cannot be said to be exercising their personal rights and duties nor to be entitled to their purely personal privileges. Rather they assume the rights, duties and privileges of the artificial entity or association of which they are agents or officers and they are bound by its obligation. In their official capacity, therefore, they have no privilege against self-incrimination. And the official records and documents of the organization that are held by them in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination, even [7] through production of the papers might tend to incriminate them personally. Such records and papers are not the private records of the individual members or officers of the organization.

Id. at 698-99, 64 S. Ct. a 1251, 88 L. Ed. at __(citations omitted).

In *Bellis v. United States*, 417 U.S. 85, 94 S. Ct. 2179, 40 L. Ed. 2d 678 (1974), the Court applied the collective entity doctrine to small partnerships. Bellis, the senior partner of a disbanded three-partner law firm, was served with a subpoena ordering him to produce the partnership records in his possession. The federal district court held an individual's Fifth Amendment privilege did not extend to a partnership's financial

books and records. The Court of Appeals for the Third Circuit agreed, and the Supreme Court affirmed. The Court noted a partnership, like a corporation, had an existence of its own apart from its members. It also recognized "that the privilege against compulsory self-incrimination should be 'limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records.'" *Id* at 89-90, 94 S. Ct. at 2184, 40 L. Ed. 2d at ___ quoting *White*, 322 U.S. at 701, 64 S. CT. at 1252, 88 L. d. 2d at 1547 (1944)). The Court concluded; "We think it is similarly clear that partnerships may and frequently do represent organized institutional activity so as to preclude any claim of Fifth Amendment privilege with respect to the partnership's financial records." *Id.* at 93, 94 S. Ct. at 2186. 40 L Ed. at 687.

This Court applied the collective entity doctrine to a professional association in *In re Special Investigation No. 281*, 299 Md. 181, 473 A.2d 1 (1984). In that case, a dentist **[8]** formed a professional association in 1981. Prior to that time, the dentist operated as a sole practitioner. Pursuant to an investigation of alleged medicaid fraud, a grand jury served a subpoena duces tecum on the dentist as the custodian of records of the professionals association. The subpoena required production of the medical records of specific patients for the years 1979 to 1982 and daily journal sheets from 1 July 1979 to 30 April 1983. Relying on the Fifth Amendment privilege against self-incrimination, the dentist moved to quash the subpoena. The trial court denied the dentist's motion.

On appeal to this Court, we addressed "whether the dentist's preincorporation patient records may be produced without violating his Fifth Amendment

privilege against self-incrimination." *Id.* at 194, 473 A.2d at 7 (footnote omitted). The dentist conceded that he had no Fifth Amendment privilege as to the records of the professional association. Holding the dentist did not have a Fifth Amendment privilege as to the patient records created while he was a sole practitioner and relying, in substantial part, on the Supreme Court's discussion of the collective entity doctrine in *Bellis, supra*, we stated:

> The patient records here at issue were a part of the warp and woof of the professional association. We believe the trial judge was correct in his conclusion that title to those patient records passed to the professional association once the records were turned over to it. These are no longer the records of the individual dentist. Hence, he had no Fifth Amendment right or privilege in those records.

Id. at 198, 473 A.2d at 10.

B. Required Records Exception

[9] Also limiting *Boyd* and explained in *Wilson* is the required records exception. The *Wilson* court noted that the custodian of public records could not assert a Fifth Amendment privilege in those records even if the records would incriminate the public official. Although the Court did not utilize the required records exception to reach its holding, it went on to expand the doctrine to cover not only public officials and public records, but in some instances an individuals' business records. The Court explained:

> The principle [of the required records exception] applies not only to public documents in public

> offices, but also to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation, and the enforcement of restrictions validly established. There the privilege which exists as to private papers cannot be maintained.

Wilson, 221 U.S. at 380, 31 S. Ct. at 544, 55 L. Ed. at 799.

The required records exception was applied to an individual's business records in *Shapiro v. United States*, 335 U.S. 1, 68 S. Ct. 1375, 92 L. Ed. 1789 (1948). William Shapiro, a wholesaler of fruit and produce, was served with a subpoena requiring him to appear before attorneys of the Office of Price Administration and produce books, records, contracts, and other records of sales he had made for a certain month. Shapiro appeared before the attorneys and turned over the records. He ultimately was convicted of violating the Emergency Price Control Act. Shapiro asserted his conviction was in violation of the Fifth Amendment privilege against self-incrimination. The Supreme Court, citing *Wilson*, noted the public documents exception to the Fifth Amendment applied not only to public documents, but also to private records required to be kept by law regarding **[10]** transactions that are the subject of governmental regulation. The Emergency Price Control Act required Shapiro to maintain various records regarding the transactions of his business, so the required records exception applied and prevented Shapiro from claiming a Fifth Amendment privilege in the records.

The Supreme County described the appositeness of the required records doctrine in three cases decided

on the same day: *Marchetti v. United States*, 390 U.S. 39, 88 S. Ct. 697, 19 L. Ed. 2d (1968); *Grosso v. United States*, 390 U.S. 62, 88 S. Ct. 709. 19 L. Ed. 2d 906; *Haynes v. Untied States*, 390 U. S. 85, 88 S. Ct. 722, 19 L. Ed. 2d 923 (1968). In these cases, the Court established a three-part test to determine the applicability of the required records doctrine. The Court stated that in order for the doctrine to apply, the purpose of the inquiry had to be regulatory, the information had to be obtained through records that the party asserting the privilege regularly maintained, and the documents had to have a public aspect. *See Grosso*, 390 U.S. at 65-66, 88 S. Ct. at 712, 19 L. Ed. 2d at ___. The Court held in each of the three cases that the elements were not met, primarily because the are of inquiry was not regulatory, but instead directed at inherently suspect activities. *See also Curran v. Price*, 334 Md. 149, 175, 638 A.2d 93, 106 (1993)(holding that the required records doctrine was not applicable to Maryland's "Son of Sam" statute because the statute was not regulatory but concerned an inherently criminal area).

We applied the required records exception in *Andresen v. Bar Association*, 269 Md. 313, 305 A.2d 845 (1973). In *Andresen*, the Bar Association of Montgomery County sought **[11]** an audit of an attorney's accounts relating to funds received in connection with a real estate closing. A Maryland statute authorized any duly organized bar association to petition the court to order an audit of accounts relating to real estate transactions.[5] Andresen asserted his Fifth

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[5]Maryland Code (1957, 19666 Repl. Vol., 1971 Supp.), Art. 21, [sec.] 42 was the applicable statue in *Andresen*. It was recodified as Maryland Code (1957, 1973 Repl. Vol.), Art. 21 [sec.] 7-106 in 1973. Section 7-106 of

Amendment privilege against self-incrimination would be violated if he were compelled to submit his accounts to the audit. The lower court ordered the audit and we affirmed. In our opinion, we noted that there were three elements to the required records exception to the Fifth Amendment privilege against self-incrimination:

> (1) the records required to be kept are of the same kind customarily kept by a person engaged in such activity; (2) the records have "public aspects" beyond the mere fact that the Government desires the information and has formalized its demand by statute, rule or regulation; (3) the records relate to an essentially non-criminal and regulatory area of inquiry.

Id. at 324, 395 A.2d at 852. In addition to the Maryland statute giving bar associations authority to conduct an audit of real estate settlement records, Maryland Rule DR 9-1-2(b)(3)[6] required attorneys to maintain records of all funds and other property of a client over which a lawyer had possession. We acknowledged that unlike the "classic prototype of the required records doctrine," *id.* at 327, 305 A.2d at 853, no pervasive regulatory **[12]** scheme then existed regarding the reporting or inspection of client records and attorney accounts. Nevertheless, we stated that the facts were "close enough in principle to warrant application of the

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Article 21 was repealed by 1974 Md. Laws, Chap. 12, at 249. A similar provision was enacted by 1974 Md. Laws, Chap. 12, at 307-10, as section 7-106 of the Real Property Article.

[6]Maryland Rule DR 9-102(B)(3), which was in effect at the time of *Andresen*, is similar to Rule 1.5(a) of the Maryland Lawyers' Rules of Professional Conduct.

doctrine."[7] *Id.* at 328-29, 305 A.2d at 853. Therefore, the required records exception prevented *Andresen* from asserting protection by the Fifth Amendment.

C. The Supreme Court's Doctrinal Shift.

A further shift in Supreme Court philosophy regarding the relationship between the Fifth Amendment privilege against self-incrimination and documents and records emerged in *Fisher v. United States*, 425 U.S. 391, 96 S. Ct. 1569, 48 L. Ed. 2d 39 (1976). In that case, a taxpayer obtained from his accountant certain documents, which were then given to his attorney, who was assisting the taxpayer with an investigation being conducted by the Internal Revenue Service. The Internal Revenue Service issued a subpoena demanding that the attorney produce the workpapers, tax returns, and correspondence between the taxpayer **[13]** and his accountant. The taxpayer claimed the accountant's papers relating to the taxpayer were protected by the Fifth Amendment.

The Supreme Court first addressed whether the client had a Fifth Amendment privilege in the various documents sought by the Internal Revenue Service. Holding the taxpayer had no such privilege, the Court stated:

> It is also clear that the Fifth Amendment does not independently proscribe the compelled

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[7]In a footnote, we stated that it was unnecessary for us to "reach the issue of whether either the statute or the rule, standing alone . . . would warrant application of the required records doctrine." *Andresen*, 269 Md. at 328 n.8, 305 A.2d at 854 n.8.

production of every sort of incriminating evidence but applies only when the accused is compelled to make a *testimonial* communication that is incriminating. . . .

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A subpoena served on a taxpayer requiring him to produce an accountant's work papers in his possession without doubt involves substantial compulsion. But it does not compel oral testimony; nor would it ordinarily compel the taxpayer to restate, repeat, or affirm the truth of the contents of the documents sought. Therefore, the Fifth Amendment would not be violated by the fact alone that the papers on their face might incriminate the taxpayer, for the privilege protects a person only against being incriminated by his own compelled testimonial communications. The accountant's work papers are not the taxpayer's/ They were not prepared by the taxpayer, and they contain no testimonial declarations by him. Furthermore, as far as this record demonstrates, the preparation of all of the papers sought in these cases was wholly voluntary, and they cannot be said to contain compelled testimonial evidence, either of the taxpayers or of anyone else. The taxpayer cannot avoid compliance with the subpoena merely by asserting that the item of evidence which he is required to produce contains incriminating writing, whether his own or that of someone else.

The act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced. Compliance with the subpoena tacitly concedes the existence of the

> papers demanded and their possession or control by the taxpayer. It also would indicate the taxpayer's belief that the papers are those described in the subpoena. The elements of compulsion are clearly present, **[14]** but the more difficult issues are whether the tacit averments of the taxpayer are both "testimonial" and "incriminating" for purposes of applying the Fifth Amendment. These questions perhaps do not lend themselves to categorical answers; their resolution may instead depend on the facts and circumstances of particular cases or classes thereof.

Id. at 408-10, 96 S. Ct. at 1579-81, 48 L. Ed. 2d at 54-65 (citations omitted)(footnote omitted).

The Court then examined whether the act of producing the records and documents would constitute testimonial self-incrimination. It noted that in order for the compelled production to constitute self-incrimination, the act of producing the papers prepared by an accountant and in the taxpayer's possession had to be both testimonial and incriminating. The Court, holding that production of the documents was not testimonial, reasoned:

> The papers belong to the accountant, were prepared by him, and are the kind usually prepared by an accountant working on the tax returns of his client. Surely the Government is in no way relying on the "truth-telling" of the taxpayer to prove the existence of or his access to the documents. The existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers.

Id. at 411, 96 S. Ct. at 1581, 48 L. Ed. 2d at 56 (citation omitted). The Court also noted that the existence of the documents sought were no more at issue than the cases discussing the collective entity doctrine. With respect to whether the production of documents themselves was incriminating, the Court noted that obtaining assistance from an accountant was not illegal. Likewise, possession of such documents was no incriminating.

[15] The impact of *Fisher* is significant with respect to an individuals' Fifth Amendment privilege as to records and documents. After *Fisher*, the focus of the Fifth Amendment privilege with respect to records and documents became not the actual documents, but instead the act of producing the documents.[8] This shift in focus is exemplified by *United States v. Doe*, 465 U.S. 605, 104 S. Ct. 1237, 79 L. Ed. 2d 552 (1984)(*Doe I)* and *Doe v. United States*, 487 U.S. 201, 108 S. Ct. 2341, 101 L. Ed. 2d 184 (1988)(*Doe II*). *See also Curran*, 344 Md. at 175, 638 A.2d at 106 ("[A] person may not claim the privilege based on 'incrimination that may result from the contents or nature of the thing demanded.'").

In *Doe I*, a grand jury issued several subpoenas demanding the production of telephone records, bank records, and business records of numerous sole proprietorships owned by Doe. The Court framed the issue as "whether, and to what extent, the Fifth

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[8]Commentators are in accord with this view. *See, e.g.*, Samuel A. Alito, *Documents and the privilege Against Self-Incrimination*, 48 U. PITT. L. REV. 27, 29 (1986)("Under this new approach, the privilege does not shield the contents of preexisting documents but may protect the act of producing them.").

Amendment privilege against compelled self-incrimination applies to the business records of a sole proprietorship." *Id.* at 606, 104 S. Ct. 1239, 79 L. Ed. 2d at 556. After discussing *Fisher* extensively, the Court stated that Doe was not compelled to prepare the documents nor would he be forced to "restate, repeat, or affirm the truth of their contents." *Id.* at 612, 104 S. Ct. at1242, 79 L. Ed. 2d at 560. The Court noted, however, that the subpoenas could compel Doe, the holder of the documents, to perform an act that could have testimonial aspects. Deferring to both lower courts' factual findings that the act of **[16]** producing the documents would involve testimonial self-incrimination, the Court held Doe's Fifth Amendment privilege against self-incrimination had been violated.

In *Doe II*, Doe was ordered by a federal district court to execute a number of consent forms that would have given the government access to foreign bank records. Doe refused and was found in contempt. The Fifth Circuit Court of Appeals affirmed without an opinion. *See In re Doe*, 812 F.2d 1404 (5th Cir. 1987). On appeal to the Supreme Court, that Court examined "whether the compelled execution of a consent form directing the disclosure of foreign bank records is inconsistent with the Fifth Amendment." *Doe II*, 487 U.S. at 206, 108 S. Ct. at 2345, 101 L. Ed. 2d at 194 (footnote omitted). Noting that the act of executing the forms would violate the self-incrimination privilege if execution were both testimonial and incriminating, the Court held "neither the form, nor its execution, communicates any factual assertions, implicit or explicit, or conveys any informant to the Government" and therefore it was not compelled testimony. *Id.* at 215, 108 S. Ct. at 2350, 101 L. Ed. 2d at 200.

Although the Supreme Court's focus has shifted from the contents of the records themselves to the act of production, the Court has not limited either the required records exception or the collective entity doctrine. They continue to retain their vitality even with respect to the act of production.

In *Braswell v. United States*, 487 U.S. 99, 108 S. Ct. 2284, 101 L. Ed. 2d 98 (1988), the Court addressed whether, in light of *Fisher*, the custodian of corporate records could **[17]** resist a subpoena on the ground that the act of producing the documents would incriminate him. Randy Braswell operated his business as a sole proprietorship between 1965 and 1980. In 1980, he incorporated the business, and in 1981, he formed a second corporation funded by the stock of the first corporation. Braswell was the sole shareholder of both corporations. In 1986, a federal grand jury issued a subpoena to Braswell requiring him to produce the books and records of the corporation. Braswell moved to quash the subpoena on the ground that the act of producing the records would tend to incriminate him, in violation of the Fifth Amendment.

Braswell argued that *Fisher*, with its focus on the act of production, had made the collective entity doctrine obsolete because that doctrine focused on the contents of the documents subpoenaed, not on the act of production. Acknowledging it had "embarked upon a new course of Fifth Amendment analysis," *Braswell*, 487 U.S. at 109, 108 S. CT. 2291, 101 L. Ed. 2d at 109, the Court disagreed with Braswell that this new course had "rendered the collective entity rule obsolete." *Id.* The Court specifically noted the agency rationale underlying the collective entity doctrine had survived *Fisher*. Ultimately, it held a custodian of records could not assert a Fifth Amendment privilege as to the production

of records even though the act of production would incriminate him personally. The Court, however, limited the government's use of the custodian's act of production, stating:

> Because the custodian acts as a representative, the act is deemed one of the corporation and not the individual. Therefore, the Government concedes, as it must, that it may make no evidentiary use of the "individual act" against the **[18]** individual. . . . The Government has the right, however, to use the corporation's act of production against the custodian.

Braswell, 487 U.S. at 118, 108 S. Ct. at 2295, 101 L. Ed. 2d at 114.

Like the collective entity doctrine, the required records exception to the Fifth Amendment privilege against self-incrimination has survived the Supreme Court's act of production analysis set forth in *Fisher*. *See Baltimore City Department of Social Services v. Bouknight*, 493 U.S. 549, 10 S. Ct. 900, 107 L. Ed. 2d 992 (1990); *Shapiro, supra*, and *California v. Byers*, 402 U.S. 424, 91 S. Ct. 1535, 29 L. Ed. 2d 9 (1971).[9]

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[9] In *Byers*, the Court examined whether a hit and run statute, which required the driver of a motor vehicle involved in an accident to stop and give certain information, violated and individual's Fifth Amendment right against self-incrimination. Although not specifically applying the three elements of the required records doctrine, the Court noted that the statute was directed to all persons who drove a motor vehicle within the state, and was not directed at a group of persons inherently suspect of criminal activity. The Court also noted compliance with the statute was neither

As illustrated by *Fisher*, *Doe I* and *Doe II*, the focus of the resolution of a Fifth Amendment claim as to records and documents is no longer on the records or documents themselves. The focus following *Fisher* is on the act of production and whether such act is a testimonial assertion that could prove incriminating to an individual. The cases teach us that the collective entity doctrine and the required records exception continue to retain their vitality following *Fisher* and its progeny. With these principles in mind, we shall resolve the case at hand.

III. DISCUSSION

[19] The subpoena issued by the Attorney Grievance Commission required appellant to produce "ALL FILES, FINANCIAL RECORDS, LEDGER CARDS AND BANK STATEMENTS pursuant to [his] representation of Ronald Price, including any contracts with third parties in connection with [his] representation of Ronald Price." Appellant argues he is entitled to assert a Fifth Amendment privilege as to the documents sought by the Attorney Grievance Commission. He cites to *Boyd* and *Spevack v. Klein*, 385 U.S. 511, 87 S. Ct. 625, 17 L. Ed. 2d 574 (1967), to establish his Fifth Amendment privilege in the records. Furthermore, appellant asserts he demonstrated a valid and sufficient basis for raising the privilege.

The Attorney Grievance Commission argues appellant did not meet his burden of establishing a substantial and real threat of criminal prosecution. Attorney Grievance Commission further argues that

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incriminating, due to the nature of the information an individual was required to provide, nor testimonial.

even if appellant demonstrated a sufficient basis for asserting the privilege, appellant, as the custodian of the business records, could not assert a privilege to avoid producing them as directed by the subpoena.

For purposes of this discussion, we shall assume that appellant demonstrated sufficiently a basis for raising the privilege. Accordingly, we need only examine whether appellant had a Fifth Amendment privilege in the documents sought by the subpoena.

Appellant's reliance on *Boyd*, in which the court held a person could not be forced to produce his private papers,[10] is unpersuasive in light of the later decisions of

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[10] Because we approach this issue assuming that the documents in this case were the attorney's documents, we deem it unnecessary to address whether the papers contained in client files are private papers of the attorney. Documents in client files may belong to the client, not the attorney. Support for such a view can be found in Rule 1.16(d) of the Maryland Lawyers' Rules of Professional Conduct. That rule states: "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as . . . surrendering papers and property to which the client is entitled. . . . The lawyer may retain papers relating to the client to the extent permitted by other law.: Maryland Code (1989, 1995 Repl. Vol.), [sec.] 10-5091 of the Business Occupations and Professions Article is the relevant statutory provision permitting an attorney to retain a client's property on which the attorney has a valid lien. We are unaware of the existence of any lien on the client files in this case. As we resolve this case on other bases, it is not necessary to determine to whom the papers belong as

the Supreme **[20]** Court, which we have discussed *supra*. In *Fisher*, the Court noted "[s]everal of Boyd's express or implicit declarations have not stood the test of time." *Fisher*, 425 U.S. at 407, 96 S. Ct. at 1579, 48 L. Ed. 2d at 54. Furthermore,

> to the extent, however, that the [*Boyd*] rule against compelling production of private papers rested on the proposition that seizures of or subpoenas for 'mere evidence,' including documents, violated the Fourth Amendment and therefore also transgressed the Fifth, the foundations for the rule have been washed away. In consequence, the prohibition against forcing the production of private papers has long been a rule searching for a rationale consistent with the proscriptions of the Fifth Amendment against compelling a person to give "testimony' that incriminates him.

Id. at 409, 96 S. Ct. 1580, 48 L. Ed. 2d at 55 (citations omitted). The Court went on to articulate the rationale behind the Fifth Amendment. It stated the Fifth Amendment protects compelled testimony, and, in the records context, it is the compelled act of production that may be testimonial, not the substance of the documents themselves. This compelled production of documents therefore, under some limited circumstances in which the **[21]** productive act is itself evidence of criminality, may violate the Fifth Amendment. Otherwise, generally, it does not.

Appellant's reliance on Spevack likewise is misplaced. He cites to that case for the proposition that

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between the attorney and the client.

"the Supreme Court has specifically said that the Fifth Amendment applies to prevent self-incrimination in attorney disciplinary proceedings." The Supreme Court's plurality opinion in *Spevack*, however, did not address the applicability of the Fifth Amendment to attorney disciplinary proceedings because the lower court had not questioned the applicability of the Fifth Amendment to attorney disciplinary proceedings. The lower court disbarred the attorney simply because he invoked the privilege against self-incrimination. The Supreme Court, noting that the Fifth Amendment was applicable to the States by way of the Fourteenth Amendment, held that an attorney could not be disbarred for merely invoking the privilege. The Court did not address whether any of the exceptions to the Fifth Amendment were applicable. In fact, Justice Fortas, in his concurring opinion. indicated he would have found the Fifth Amendment inapplicable to the records of the attorney on the basis of the required records doctrine. *See Spevack*, 385 U.S. at 473-74, 87 S. Ct. at 2745, 17 L. Ed. 2d at 580.

An examination of *Fisher* and its progeny makes clear that with regard to a subpoena seeking production of documents, the Fifth Amendment is not violated simply because the papers, on their face, might incriminate the individual because the privilege protects an individual only from being incriminated by his own compelled testimonial communications. **[22]** It is the act of production, under certain limited circumstances, that may be testimonial and may incriminate the individual who produces the records. This is because the act of production may have communicative aspects. Production may demonstrate that the individual has possession or control over records or other items for

which it is criminal for the attorney to have possession or retain control.[11] Additionally, it may show that the individual believes the records or other items to be those sought by the subpoena.

The Supreme Judicial Court of Massachusetts has examined, in the context of an attorney disciplinary investigation, whether the act of producing documents was testimonial and therefore protected by the privilege against self-incrimination. The court, declining to hold production of documents would be testimonial or incriminating, stated:

> Production of the documents is an admission that the records exist, that they are in the possession of the person and that they are authentic; such an admission could be incriminating. Since the records sought in the present case are required by statute or rule, there is nothing incriminating in the fact that they exist and are in the possession of Mr. Kenney. Production does not compel oral testimony nor does it compel Mr. Kenney "to restate, repeat, or affirm the truth of the contents of the documents sought."

In re Kenney, 399 Mass. 431, 441, 504 N.E.2d 652, 658 (1987) (quoting *Fisher*, 425 U.S. at 409, 96 S. Ct. at 1580, 48 L. Ed. at 55)(citations omitted). *Cf. In re*

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[11]For example, a client may give his or her attorney items that have been stolen. Maryland Code (1957, 1996 Repl. Vol.), Art. 27, [sec.] 341 makes it a crime for a person to receive stolen property. In such an instance, turning over the items would show that the attorney had possession of the items, and therefore the act of production would be incriminating.

Maurice, 73 F.3d 124, 126 (7th Cir. 1995)(holding an attorney did not have a Fifth Amendment privilege so as to **[23]** prevent production to the court of a list of monetary sanctions imposed by other state and federal courts and the amounts paid on such court-imposed sanctions).

In the case *sub judice*, it is undisputed that appellant represented Mr. Price in a criminal trial and in other matters. The documents requested by the Attorney Grievance Commission are the type normally kept by an attorney during the course of representation of his or her client. Additionally, it is a "foregone conclusion" that appellant has possession and control of the client records and financial records of the partnership. It is not criminal to possess or control such records. Accordingly, the existence and possession of the records has no testimonial significance. Therefore, the production of the documents is not incriminating for the purposes of the Fifth Amendment.

What appellant fears is the contents of the records, not any criminal liability solely arising out of the possession of these documents. Under *Fisher*, appellant has no Fifth Amendment privilege with respect to production of the records. Possession of the records is not a criminal act and, under the circumstances here present, could not be a criminal act.

Even if we were to assume that the act of producing the documents was both testimonial and incriminating, appellant would have no Fifth Amendment privilege so as to avoid compliance with the subpoena. Under the circumstances of this case, both the collective entity doctrine and the required records doctrine, which survive *Fisher*, prevent appellant from relying on his Fifth Amendment privilege to avoid producing the

records. **[24]** We further explain the applicability of these tow doctrines with regard to the act of production.

Although the subpoena did not contain the name of the law firm in which appellant practices law, it sought from appellant production of files, financial records, ledger cards, and bank statements with respect to appellant's representation of Mr. Price. It is reasonable to presume that a subpoena requesting the production of the types of records sought in this case from a partner or an attorney in a law firm is a request for the records of the firm with respect to requested subject. A subpoena directed at an attorney of a firm for record relating to one or more of the attorney's clients is served upon the attorney as the custodian of his client's records, which incidentally are also the firm's records. Accordingly, although the subpoena did not mention the firm or appellant in his capacity as custodian, the subpoena was served upon him as custodian of the records relating to his representation of Mr. Price.

In *Braswell*, the Supreme Court noted that the collective entity doctrine is alive and well following *Fisher*. Thus, any Fifth Amendment claim an individual may assert against production collective entity's records is not viable under *Braswell*. The Supreme Court explicitly held in that case that a custodian of records of a collective entity is not entitled to resist a subpoena on the ground that production of the documents may incriminate the custodian individually. Appellant. therefore, as a record custodian of the firm, a collective entity under *Bellis*, may not resist the subpoena on the ground that the production of the documents may incriminate him. We perceive no reason to make any distinction with **[25]** respect to how we shall treat the Fifth Amendment privilege against self-incrimination in matters relating to lawyers and the business entities of

which they are a part. In this case, the record relating to Mr. Price are the records of the partnership and must be produced pursuant to the collective entity doctrine. *See also In re Zisook*, 88 Ill.2d 231, 58 Ill. Dec. 786, 430 N.E.2d 1037 (1982), *cert. denied*, 457 U.S. 1134, 102 S. Ct. 2962, 73 L. Ed.. 2d 1352 (1082)(holding that attorneys of a professional corporation could not involve the privilege against self-incrimination as to the corporate records, which included client files, in their possession).

We next examine the applicability of the required records exception to the facts of this case. We shall address the issue we fund unnecessary to resolve in *Andresen*, namely, whether the rules of professional conduct standing alone warrant application the required records doctrine. We hold the Maryland Rules and Maryland Lawyers'' Rules of Professional Conduct sufficient regulate the conduct of attorneys with regard to client matters such that, under the required records doctrine, an attorney cannot claim a Fifth Amendment privilege in records relating to his or her client.

In order for the required records doctrine to apply, three elements must be met. First, the purpose of the inquiry must be regulatory, not criminal. Second, the records or documents must be of the type customarily required to be kept by the regulated party. Finally, the records or documents must have a public aspect.

[26] Rule 1.15(a) of the Maryland Lawyers' Rules of Professional Conduct (MLRPC) provides:

> A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's owns property. Funds shall be kept in a

> separate account maintained pursuant to Title 16, Chapter 600 of the Maryland Rules. Other property shall be identified as such and appropriately safeguarded. *Complete records of such account funds and of other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.* [Emphasis added.]

Chapter 600 of title 16 of the Maryland Rules provides extensive regulation with regard to attorney trust accounts. For example, Rule 16-603 requires an attorney to maintain a trust account if the attorney receives funds for the benefit of a client or third person. Maryland Rule 16-605 requires certain actions by the attorney before a trust account can be established. Rule 16-606 provides for the proper designation of a trust account.

Chapter 700 of title 16 of the Maryland Rules relates to the Attorney Grievance Commission. One of the purposes of the Commission is to discipline members of the bar. In order to do so, the Attorney Grievance Commission must conduct an investigation. To that extent, Bar Counsel "may issue an subpoena to compel the production of designated documents or other tangible things." Md. Rule 16-704(c).

Other disciplinary rules adopted by this Court regulate the conduct of attorneys. For example MLRPC 1.2(a) requires the attorney to "abide by a client's decisions concerning the objectives of representation." An attorney must "act with reasonable diligence and promptness in representing a client." MLRPC 1.3. MLRPC 1.4 requires an attorney to keep **[27]** his or he clients informed about the status of the representation. The MLRPC is replete with additional examples of the

pervasive regulation of attorneys established by this Court.

Examining the three elements of the required records doctrine leads us to conclude that the doctrine applies in this instance. The Maryland Rules, MLRPC, and rules relating to admission to the Bar demonstrate that the purpose of the Attorney Grievance Commission's inquiry is regulatory. Furthermore, this Court has the "inherent Constitutional authority to regulate the practice of law." *Post v. Bregman*, ___ Md. ___, ___A.2d___(1998) [slip op. at 21]. Second, the records and document sought to be obtained by the subpoena are required and customarily kept by persons engaging in the practice of law. MLRPC 1.5 requires an attorney to keep complete records of transactions that involve funds of a client or third parties. Third, the records subpoenaed have public aspects. We have noted upon numerous occasions that one of the purposes of attorney disciplinary proceedings is to protect the public. *Attorney Grievance Comm'n v. Adams*, ___Md.___, ___A.2d___(1998) [slip op. at 13]; *Attorney Grievance Comm'n v. Awuah*, 346 Md. 420, 435, 697 A.2d 446, 454 (1997). Furthermore, "[t]he [legal] profession has a responsibility to assure that its regulations are conceived in the public interest. . . . Every lawyer is responsible for observance of the Rules of Professional Conduct. . . . Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves." MLRPC Preamble.

[28] Other state courts addressing an attorney's ability to invoke the Fifth Amendment privilege against self-incrimination with respect to documents and records likewise hold that the required records exception is applicable. The Supreme Court of Florida, in *Florida*

Bar v. White, 384 So.2d 1266, 1267 (Fla. 1980), adopted a referee's report, which provided:

> The records involved in the instant case are required to be maintained by The Florida Bar and the Integration Rule. These records are deemed to be affected with a public interest, necessary to be maintained for the protection of the public as well as The Florida Bar. The privilege arising from the Fifth Amendment through the Fourteenth Amendment is not applicable thereto.

In *In re Kennedy*, 442 A.2d 79 (Del. 1982), the Delaware Supreme Court relied in part on our opinion in *Andresen*, 269 Md. at 313. 305 A.2d 845, to establish the applicability of the required records doctrine to attorney records. Although the attorney failed to assert his Fifth Amendment Rights as to the records, the Delaware Supreme Court stated: "we agree with the statement of the law made in *Andresen* and so could, for that reason, conclude that the records here in issue are required to be maintained by the Rules adopted by this Court in its unquestioned authority to set minimum standards of conduct for members of the Bar...." *In re Kennedy*, 442 A.2d at 89. *See also Louisiana State Bar Ass'n v. Chatelain*, 513 So.2d 1178, 1183 (La. 1987)("The records which were requested by subpoena duces tecum in this case meet the requirements of the 'required records doctrine'. . . ."); *In re Kenney*, 399 Mass. at 438, 504 N.E.2d at 657 ("We agree with the single justice that the documents in questions fall within the 'required records' exception. . . .").

[29] The Rules of Professional Responsibility and Maryland Rules demonstrate the pervasive regulation of attorneys by this Court. Production of the documents requested in this case is required as part of a noncriminal

regulatory regime. Accordingly, for this additional reason, appellant cannot resist the subpoena on the ground that production of the documents violated his privilege against self-incrimination.

IV. CONCLUSION

Appellant is not entitled to claim a Fifth Amendment privilege against self-incrimination to avoid production of the documents sought by the subpoena. The act of producing the records is neither testimonial nor incriminating. Additionally, appellant, as custodian of records of the partnership in which he practices law, may not claim that the records of the partnership may incriminate him individually. Moreover, under the Maryland Rules and MLRPC, production of the documents is part of a noncriminal regulatory regime. Appellant, for all of the reasons we have stated, may not resist a subpoena as to the records on the ground that production may violate his Fifth Amendment privilege against self-incrimination.

JUDGMENT AFFIRMED;
APPELLANT TO PAY COST.

COURT OF APPEALS OF MARYLAND

CORRECTION

April 21, 1998

Please make the following correction in the case of

UNNAMED ATTORNEY

V.

ATTORNEY GRIEVANCE COMMISSION OF MARYLAND

No. 78, September Term, 1998

On page 11, Footnote 6, second line NOW READS:
1.5(a) of the Maryland Lawyers' Rules of Professional Conduct.

SHOULD READ:
1.15(a) of the Maryland Lawyer's Rules of Professional Conduct.

On page 27, first full paragraph, line 8 NOW READS:
MLRPC 1.5 requires an attorney to keep complete records of transactions that involve funds

SHOULD READ:
MLRPC 1.15 requires an attorney to keep complete records of transactions that involve funds.

Yours truly, Alexander L. Cummings

COURT OF APPEALS
of Maryland
Robert C. Murphy
Courts of Appeal Building
361 Rowe Boulevard
Annapolis, Md. 21401-1600

May 20, 1998

Benjamin Lipsitz, Esq.
100 Church Lane
Baltimore, MD 21208

Re: Unnamed Attorney v. Attorney
Grievance Commission of Maryland
No. 78, September Term, 1997

Dear Mr. Lipsitz:

Please be advised that the motion for reconsideration filed in the above-captioned case was denied by the Court on May 20, '98. A copy of the order and mandate are enclosed.

Very truly yours.

/s/ Alexander L. Cummings
/t/ Alexander L. Cummings
Clerk

ALC/fmw
Enclosure

cc: Melvin Hirshman, Esq.

IN THE MATTER OF PETITIONER	*	IN THE CIRCUIT COURT FOR BALTIMORE COUNTY
	*	
	*	CASE NO.3-C-97-3597

ORDER

Hearing having been held on the Motion to Quash Subpoena filed by Petitioner in the above entitled matter, and argument of counsel for all parties having been heard, it is this 14th day of July, 1997, by the Circuit Court for Baltimore County, ORDERED, that the Motion to Quash Subpoena is hereby denied except to the extent that any information regarding possible criminal activity obtained in connection with said Subpoena may not be disclosed to any person or entity by Bar Counsel without prior Order of this Court.

/s/ James T. Smith, Jr.
/t/ JAMES T. SMITH, JR.
JUDGE

JTS/SW
Copy: Benjamin Lipsitz, Esq.
Melvin Hirshman, Esq.